

No. 48943-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA D.C. RHOADES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR LEWIS COUNTY

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Mr. Rhoades was previously ordered to pay legal financial obligations (herein “LFOs”) on three Superior Court cases, even though no individualized determination was made regarding his present or future ability to make payments. Mr. Rhoades brought the issue before the Superior Court and requested that said LFOs be waived due to continued and persistent indigence. The court denied Mr. Rhoades’s request and the LFOs remained as-is.

B. ASSIGNMENTS OF ERROR

1. The court failed to engage in a sufficient individualized inquiry of indigence and/or it abused its discretion by imposing LFOs when Mr. Rhoades is unable to pay such costs.

C. STATEMENT OF THE CASE

**1. Cause No. 99-1-00424-2.**

Mr. Rhoades was convicted in Lewis County Superior Court of Assault in the Second Degree on July 15, 1999 in cause number 99-1-00424-2. CP 1-8. LFOs were imposed, including \$4,054.00 in restitution, \$500.00 victim’s assessment pursuant to RCW 7.68.035, \$110.00 criminal filing fee pursuant to RCW 9.94A.030, \$380.00 in court appointed attorney’s fee pursuant to RCW 9.94A.030, and \$1,000.00 for incarceration costs in the Lewis County Jail pursuant to former RCW

9.94A.145 (recodified as RCW 9.94A.760). CP 3. Additional restitution was ordered in the amount of \$3,528.61 in an amended restitution order. CP 11-12.

On June 2, 2009, the State motioned the court to extend jurisdiction for collection of the LFOs pursuant to RCW 9.94A.760(4), as Mr. Rhoades still owed \$11,718.53. CP 13-14. The court granted the extension of jurisdiction. CP 15.

**2. Cause No. 00-1-00169-1.**

On April 11, 2000, Mr. Rhoades was convicted of Vehicle Prowling in the Second Degree (four counts), Theft in the Third Degree, and Theft in the Second Degree in Lewis County Superior Court. CP 38-45. The court imposed LFOs in the amounts of \$500.00 for victim's assessment, \$110.00 for criminal filing fee, \$380.00 for court appointed attorney fee, \$1,000.00 for incarceration in the Lewis County Jail. CP 40. Restitution was subsequently ordered on June 27, 2000 in the total amount of \$544.90. CP 46-47. On March 16, 2010, the State motioned the court to extend jurisdiction for collection of the LFOs, as Mr. Rhoades still owed \$4,770.68. CP 48-49. The court granted the extension of jurisdiction. CP 52.

**3. Cause No. 06-1-00613-0.**

On January 5, 2007, Mr. Rhoades was convicted of Harassment (gross misdemeanor) and Unlawful Display of a Weapon (gross misdemeanor) in Lewis County Superior Court. CP 75-77. The court imposed LFOs in the amount of \$200.00 for criminal filing fee, \$500.00 for victim's assessment, \$800.00 for court appointed attorney fee, \$210.00 for subpoena service fee, and \$1,000.00 for jail recoupment fee. CP 76. On January 23, 2007, an order amending LFOs was entered to add a cost for investigative services in the amount of \$564.80. CP 78-79.

#### **4. Consolidated cases.**

On April 26, 2016, Mr. Rhoades filed a motion to terminate LFOs with supporting affidavit in cause numbers 99-1-00424-2, 00-1-00169-1, and 06-1-00613-0. CP 29-34, 65-70, 94-99. On May 3, 2016, a hearing to address the LFOs was held at the same time as a resentencing on an unrelated matter on cause number 13-1-00076-2. RP 1-2.

Mr. Rhoades argued that an individualized finding was not made in each of the three cases as required under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). RP 19; CP 34, 70, 99. Mr. Rhoades indicated in his affidavit that he has been confined at the Department of Corrections (herein "DOC") and that DOC has been taking money from him to pay LFOs. CP 34, 70, 99. The money taken from him by DOC has been an undue burden on him and his family. *Id.* During inquiry from the court,

Mr. Rhoades indicated that he did not have any physical or mental reason that would prevent him from getting a job in the future. RP 13. He was currently taking classes at DOC to be trained as a baker. RP 13. Mr. Rhoades has nine Superior Court cases that he is making LFO payments on. RP 14. He has four children that he would presumably be responsible for upon release. RP 14.

The court denied Mr. Rhoades's motions and found that he has the future ability to pay LFOs. RP 20; CP 35-36, 71, 100. Mr. Rhoades timely filed an appeal in each of these cause numbers and the matters were consolidated for appeal. CP 37, 72, 101. Mr. Rhoades was found by the court to be indigent and his appellate filing fee was waived by the Superior Court. CP 73-74, 102-103.

D. ARGUMENT

**1. The court failed to sufficiently engage in an individualized inquiry of Mr. Rhoades's ability to make payments and/or erred in continuing to impose unpayable LFOs.**

The imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations. *State v. Duncan*, 185 Wn.2d 430, 436, 374 P.3d 83, 86 (2016) (citing *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1976); *Fuller v. Oregon*, 417 U.S. 40, 44-47, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)). "The consequences of the

State's LFO system are concerning, and addressing where courts are falling short of the statute will promote justice." *Blazina*, 182 Wn. 2d at 827 (Fairhurst concurrence). By statute, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). To determine the amount and method for paying the costs, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id.* The term "shall" as used in this statute is imperative, not discretionary. *Blazina*, 182 Wn. 2d at 838. "RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." *Blazina*, 182 Wn. 2d at 839. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id.*

Likewise, there are seven requirements that were delineated in *State v. Curry*, 118 Wn. 2d 911, 915-916, 829 P.2d 166, 167 (1992) which must be met in order for there to be a constitutionally permissible costs and fees structure:

- (1) Repayment must not be mandatory;
- (2) Repayment may be imposed only on convicted defendants;

- (3) Repayment may only be ordered if the defendant is or will be able to pay;
- (4) The financial resources of the defendant must be taken into account;
- (5) A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
- (6) The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
- (7) The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

Regarding restitution payments specifically, RCW 9.94A.750 indicates that "[t]he court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have." Regarding costs imposed on an offender for the costs of incarceration, RCW 9.94A.760(2) expressly requires a determination by the trial court "that the offender, at the time of sentencing, has the means to pay." *State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d 1167, 1168 (2015).

Appellate courts review a decision on whether to impose LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309, 310–11 (2015) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court’s factual determination concerning a defendant’s resources and ability to pay is reviewed under the “clearly erroneous” standard. *State v. Bertrand*, 165 Wn. App. 393, 403–04, 267 P.3d 511 (2011); *Baldwin*, 63 Wn. App. at 312, 818 P.2d 1116.

In the instant case, Mr. Rhoades has no actual ability to make sufficient payments to the court such that he would be able to pay off his LFOs. He is currently incarcerated on cause number 13-1-00076-2 for 77 months. RP 11. Any money that he may receive on his books at DOC will be seized by DOC for his LFOs. CP 34, 70, 99. Moreover, upon release, Mr. Rhoades is unlikely to receive gainful employment due to his numerous prior felonies. RP 11, 14.

Mr. Rhoades’s inability to pay LFOs is self-evident from the number of years that have elapsed since obligations have been in place – over 17 years on case 99-1-00424-2, over 16 years on case 00-1-00169-1, and nearly 10 years on case 06-1-00613-0. Mr. Rhoades has been deemed

to be indigent by the court for at least the past 17 years, which leads one to believe that his indigency will not end. CP 3. These fines are seemingly lasting in perpetuity, which will continue to be a burden for the rest of Mr. Rhoades's life, if relief is not granted.

The court did not appear to take Mr. Rhoades's particularized circumstances into account when continuing to impose these LFOs. The court generally inquired as to whether Mr. Rhoades was physically and mentally able to seek employment, but the court apparently did not take into account Mr. Rhoades's extended incarceration and lack of job prospects upon release from incarceration. Certainly, a defendant who has no actual current ability to make payments cannot be expected to currently make payments. Likewise, a defendant who has such unlikely prospects to gain employment in the future cannot be expected to make payments in the future. Moreover, the court did not consider Mr. Rhoades's debts, which at a minimum for the three cause numbers before the court, total \$15,382.31 in LFO debts before taking into account the statutorily required 12% interest rate per annum. Lastly, the court did not consider Mr. Rhoades's ability to pay at the time of incarceration in the local jail to determine whether a jail recoupment fee should be imposed.

Given the above, the court abused its discretion in denying Mr. Rhoades's motion for relief from LFOs because the decision was based on

untenable grounds. In the alternative, the court erred by not going through a more thorough analysis of Mr. Rhoades's financial history before making its ruling.

E. CONCLUSION

Given the foregoing, Mr. Rhoades's LFOs should be stricken due to an inability to make payments. In the alternative, this case should be remanded to the Superior Court for purposes of making a sufficient individualized inquiry into Mr. Rhoades's ability to make payments.

DATED this 14th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Lewis County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on November 14, 2016 to email address [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov). Service was made by email pursuant to the Respondent's consent. I also served Appellant, Joshua D.C. Rhoades, a

true and correct copy of the document to which this certification is affixed as well as copies of the Verbatim Report of Proceedings and combined Designation of Clerk's Papers on November 14, 2016 via first class mail postage prepaid to Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

s/ Sean M. Downs  
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**November 14, 2016 - 3:59 PM**

## Transmittal Letter

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### Comments:

Appellant's opening brief

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